Supreme Court, U.S.
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No. 02-1373

In The

Supreme Court of the United States

MARIAN L. OLSON and IDA MAE BRUESKE,

Petitioners,

v.

HILLSIDE COMMUNITY CHURCH, S.B.C., a non-profit corporation; FIRST BANK OF ARVADA, N.A.; THE CITY OF GOLDEN, a Colorado municipal corporation; and THE CITY COUNCIL OF THE CITY OF GOLDEN,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Colorado

BRIEF IN OPPOSITION FOR RESPONDENTS CITY OF GOLDEN AND THE CITY COUNCIL OF GOLDEN

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QUESTIONS PRESENTED

1. Whether this Court is bound by the Colorado Supreme Court's interpretation of an ordinance governing special use applications, pursuant to which it determined that the planning commission had broad discretion to approve or deny an application, and, therefore, Petitioners had no protected property interest in having an adjoining landowner's application denied.

2. If this Court declines to give effect to the Colorado Supreme Court's interpretation, whether the test articulated by this Court in *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972), for determining when an applicant for a governmental benefit has a property right protected by the Fourteenth Amendment applies to the question of whether an opponent of another party's application can acquire a property interest in having the application denied.

3. If this Court determines that Petitioners have a property right protected by the Fourteenth Amendment, whether the Colorado Supreme Court correctly applied this Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part by Daniels v. Williams*, 474 U.S. 327 (1986), in deciding that Petitioners had received due process.

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OPINIONS BELOW

The opinion of the Colorado Supreme Court is reported at 58 P.3d 1021 (Colo. 2002), and appears at Pet. App. 1-23. The opinion of the Colorado Court of Appeals is reported at 42 P.3d 52 (Colo. App. 2001), and appears at Pet. App. 24-33. The *Findings of Fact, Conclusions of Law and Judgment* of the district court is unreported and appears at Pet. App. 34-59.

In addition to the opinions contained in Petitioners' Appendix, two decisions in post-judgment contempt hearings in this case are relevant to the issues raised by Petitioners. In the first hearing, a bench ruling of the trial court finding contempt was reversed by the Colorado Court of Appeals in an unpublished opinion which appears at App. 1 through App. 5. In the second hearing, the trial court found no contempt had occurred. The trial court's written order is found at App. 6 through App. 8; it has been appealed by Petitioners.

STATEMENT OF THE CASE

Petitioners Marian L. Olson ("Olson") and Ida Mae Brueske own homes in the City of Golden, Colorado ("Golden") adjacent to Hillside Community Church, S.B.C. ("Hillside"). A Golden planning official mistakenly issued two building permits to Hillside in May 1997 and October 1997 for construction of an addition to Hillside's existing church building. At the time the permits were issued, the church property was located within an R-1 zone district. Pet. App. 37. Under pertinent provisions of the Golden Municipal Code in effect at the time (the "GMC"), churches were not a use permitted by right in such district. *Id.*

Therefore, the proposed addition did not conform to the applicable zoning regulations.

After the addition was substantially complete, Petitioners wrote to Golden asserting that the building permits had been issued in error. Pet. App. 4. The city attorney determined that Petitioners were correct, but Golden, relying upon the doctrine of relative hardship set forth in *Hargreaves v. Skrbina*, 662 P.2d 1078 (Colo. 1983), declined to revoke the building permits or require that the addition be modified or torn down. Pet. App. 4-5.

The GMC provides that no structure shall be constructed without first obtaining a building permit, and that no building permit shall issue unless the structure complies with the zoning regulations. Pet. App. 60, GMC § 18.30.030. If any structure is erected in violation of GMC § 18.30.030, any owner of real property within the city may file a suit for injunction or mandamus. Pet. App. 60, GMC § 18.30.050. Petitioners filed suit asserting various claims for relief, including claims for injunction and mandamus pursuant to GMC § 18.30.050. Following an eight-day trial, the court entered an order of mandamus and an injunction directing Golden to vacate the certificate of occupancy for the addition and directing that no new certificate of occupancy be issued absent compliance with all other provisions of the GMC and the building code. Pet. App. 55. The trial court determined that under the doctrine of relative hardship the structure did not need to be removed, provided that the appropriate approvals were subsequently obtained and the structure was made to comply with other code provisions. Pet. App. 56. The Colorado Court of Appeals reversed the trial court's ruling that the doctrine of relative hardship applied, and

affirmed its decision with respect to the order of mandamus and injunction.

Although Hillside had not applied for a special use permit and Golden had not issued one, Petitioners also asserted a claim under 42 U.S.C. § 1983 alleging that by issuing the building permits Golden had deprived Petitioners of the opportunity to participate in Golden's special use permit procedure in violation of their right to procedural due process. The trial court determined that the addition would have been a permitted use had Hillside first obtained a special use permit. Pet. App. 37. It also determined that under the regulations governing special use permits, Petitioners would have been entitled to notice of and an opportunity to participate in a public hearing on any application for such a permit. Pet. App. 51. It concluded, therefore, that Petitioners' "procedural due process rights" were violated, directed Hillside to file an application for a special use permit, directed Golden to process the application, and awarded Petitioners attorneys' fees under 42 U.S.C. § 1988. Pet. App. 52-53. The Colorado Court of Appeals affirmed the trial court's judgment on the procedural due process claim. Pet. App. 27-28.

The Colorado Supreme Court granted certiorari solely as to the due process claim and reversed. Pet. App. 1-23. It reversed the judgment on two separate and independent grounds. First, it determined that Petitioners had no property interest in the special use procedures of the GMC or in the outcome of an application under such procedures. Pet. App. 3-4. Second, it determined that due process had been provided by the mandamus and injunction remedy. Pet. App. 4.

With respect to the issue of whether Petitioners had an interest protected by the Fourteenth Amendment, the court identified two possible property interests, the procedural rights granted to adjacent property owners under the special use regulations and an asserted entitlement to have any special use application denied. Following this Court's decision in *Olim v. Wakinekona*, 461 U.S. 238, 250 n.12 (1983), it held that procedural rights, without more, do not create a constitutionally protected property interest. Pet. App. 10-14. As to Petitioners' asserted entitlement to a denial of any special use application, the court held that because of the broad discretion granted to the planning commission and city council under the Golden special use ordinance, Petitioners had no "claim of entitlement" to a denial. Pet. App. 14-19. Relying on this Court's decision in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), it concluded that, without a claim of entitlement to a denial, Petitioners could have no property interest protected by the Fourteenth Amendment. Pet. App. 19.

Based on this Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part by Daniels v. Williams*, 474 U.S. 327 (1986), the Colorado Supreme Court also determined that, even assuming a property interest existed, any deprivation suffered by Petitioners did not take place without due process of law. Because the building permits had been issued as a result of an unanticipated mistake by the planning official and in violation of the governing ordinance, the city could not have anticipated the deprivation or conducted a pre-deprivation hearing. Pet. App. 20-21. Therefore, the post-deprivation remedies of mandamus and injunction satisfied the requirements of due process. Pet. App. 19-22.

While the case was on appeal, Petitioners twice moved to have Hillside and Golden found in contempt of the original judgment. Following trial, Hillside elected to seek a rezoning of its property rather than a special use permit. The trial court found Hillside and Golden in contempt of court for filing and processing the rezoning because a rezoning would moot the need for the special use permit and height variance the original judgment had directed Hillside to seek. That decision was reversed by the Colorado Court of Appeals. App. 1 through App. 5. After the contempt order was reversed, Hillside brought the property into compliance, and Golden issued a new certificate of occupancy. Petitioners then moved to have Golden found in contempt of the portion of the original order directing that no new certificate of occupancy be issued until the addition complied with applicable zoning regulations and the building code. The trial court determined that the addition was in compliance and, therefore, Golden was not in contempt. App. 6 through App. 8. That decision is on appeal before the Colorado Court of Appeals.

REASONS FOR DENYING THE PETITION

The Colorado Supreme Court's decision is squarely in accord with this Court's decisions in *Olim*, 461 U.S. 238, *Roth*, 408 U.S. 564, and *Parratt*, 451 U.S. 527. The holdings in those cases compel the conclusion that Petitioners have not established the elements of a procedural due process claim. To establish a violation of the right to procedural due process a plaintiff must prove: (1) the existence of a constitutionally protected interest in either life, liberty or property, (2) the deprivation of that interest from government action, and (3) that the deprivation

occurred without constitutionally adequate pre- or post-deprivation process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). None of the elements are present in this case.

Despite the fact that the other elements of a procedural due process claim are missing, Petitioners suggest this Court should grant certiorari in order to define a common standard for identifying property interests created by land use regulations in the due process context. While it may be true that some confusion exists among federal circuits and state courts as to the proper application in the land use context of the "legitimate claim of entitlement" test articulated by this Court in *Roth*, 408 U.S. 564, this case is not a proper vehicle to address those concerns. The Colorado Supreme Court interpreted the special use ordinance in question to provide the Golden Planning Commission and Golden City Council with "significant – if not unlimited – discretion" to approve or deny any application for a special use permit. Pet. App. 16. This Court is bound by the Colorado Supreme Court's construction of the ordinance. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992). Given that construction, Petitioners' rights would not constitute a property interest under the standards of any of the lower courts utilizing the *Roth* test to determine whether a property right exists in land use cases.

I. THIS CASE IS NOT A GOOD VEHICLE TO ADDRESS DIFFERING DEFINITIONS OF PROPERTY

Although Petitioners argue that this case presents a "perfect vehicle for the Court to determine what constitutes a property right," *see* Pet. 21, the Petition is

remarkably vague as to the precise property interest of Petitioners at issue. In essence, Petitioners claim that: (i) they have a property interest in restricting Hillside from using its property in certain ways; (ii) this property interest arises not from any common law property interest, such as might arise from a restrictive covenant or under nuisance law, but solely from applicable zoning regulations, and (iii) errors in administration of the zoning regulations deprived Petitioners of their interest without due process. The vast majority of the cases cited in the Petition address only the question of whether an applicant has a property interest in receiving a development permit for his property, not whether one opposing another landowner's application may have a property interest in denial of the application. Even if the courts do apply different standards to determine whether an applicant has a property interest in the requested permit, this case will not permit this Court to address the discrepancies, because it poses an entirely different question.

At different stages of the litigation, Petitioners have identified three different, but related, interests as the basis for their due process claim. The Complaint and Amended Complaint alleged a deprivation "of the right to participate in the Special Use Permit procedure," in other words, procedural rights. Record Vol. 1 at 4; Vol. 3 at 509. It is this interest which was considered by the trial court and court of appeals. The trial court held that Petitioners had a property interest in the procedures governing special use applications. Pet. App. 52. The Colorado Court of Appeals also ruled that Petitioners had been deprived of procedural rights.

> [T]he city *denied [Petitioners] the opportunity to testify at a special use permit hearing*. Therefore,

> the trial court properly found that [Petitioners'] procedural due process rights were violated, and they are *entitled to a hearing on the permit.*

Pet. App. 28 (emphasis added).

Before the Colorado Supreme Court, Petitioners identified their property interest as the right to a denial of any special use application by Hillside. Neither of the lower courts had ruled that Petitioners were entitled to a denial, and, indeed, such a holding would have been inconsistent with the order directing Hillside to file a special use application and Golden to conduct a hearing on the application. Pet. App. 53, 55. The Colorado Supreme Court determined that no property interest in a denial existed but described the court of appeals' ruling as finding Petitioners had such an interest. Pet. App. 9-10. Although not entirely clear, Petitioners now appear to be claiming a slightly different interest by arguing that Olson has suffered "deprivation related to the use and enjoyment of her property." Pet. 21. None of the identified interests constitutes a property interest protected by the Fourteenth Amendment.

A. Procedural Rights

Procedural rights are not constitutionally protected property rights. *Olim*, 461 U.S. at 250. "Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Id.*

Although *Olim* involved procedures governing transfer of a prisoner to another state, numerous lower courts have applied its holding in other contexts. In a takings case, the Sixth Circuit said: "What the Due Process

clauses of the Fifth and Fourteenth Amendments protects [sic] is 'life, liberty [and] property,' not the procedures designed to protect life, liberty, and property." *Montgomery v. Carter County*, 226 F.3d 758, 768 (6th Cir. 2000) (citations omitted). Finding no violation of due process in the failure of officials to properly follow state procedures in a collection case, the First Circuit stated: "The simple fact that state law prescribes certain procedures does not mean that the procedures thereby acquire a federal constitutional dimension." *Slotnick v. Staviskey*, 560 F.2d 31, 34 (1st Cir. 1977), *cert. denied*, 434 U.S. 1077 (1978). The Third Circuit found that the improper use in a lineup of a defendant's photograph in violation of state procedures governing the use of juvenile records did not violate the defendant's right to due process. *United States v. Jiles*, 658 F.2d 194, 200 (3d Cir. 1981), *cert. denied*, 455 U.S. 923 (1982). The Colorado Supreme Court applied the principle in a licensing proceeding. *Ficarra v. Dep't of Regulatory Agencies*, 849 P.2d 6, 20 (Colo. 1993) ("fact that the General Assembly has created a right to such a hearing does not mean that plaintiffs are independently entitled to it as a matter of constitutional law").

Numerous courts have also applied the *Olim* holding with respect to land use procedures. *See, e.g., River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166-67 (7th Cir. 1994) ("[T]he Constitution does not require state and local governments to adhere to their procedural promises. Failure to implement state law violates that state law, not the Constitution." (citations omitted)); *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1105 (8th Cir. 1992) ("A bad-faith violation of state law [requiring public notice before enactment of zoning ordinances] remains only a violation of state law."); *Fusco v. Connecticut*, 815

F.2d 201, 205-06 (2d Cir. 1987), *cert. denied*, 484 U.S. 849 (1987) (no property interest in purely procedural rights); *Crocker v. Hakes*, 616 F.2d 237, 239 n.2 (5th Cir. 1980) ("The violation of a state statute does not automatically give rise to a violation of rights secured by the Constitution."); *Double I Ltd. P'ship v. Plan and Zoning Comm'n.*, 588 A.2d 624, 631 (Conn. 1991) (procedural guarantees of state law do not create property interest).

The Colorado Supreme Court's determination that procedural rights granted to Petitioners under the zoning regulations, without more, do not rise to the level of a constitutionally protected property interest is both faithful to this Court's decision in *Olim*, 461 U.S. 238, and consistent with the decisions of other courts which have considered the issue. Petitioners characterize this ruling as adopting a "minority view," *see* Pet. 7, but cite no case to contradict the numerous cases discussed above.

B. Entitlement to Denial of Special Use Application

This Court's statement that the "expectation of receiving process, without more," is not an interest protected by the Fourteenth Amendment, *see Olim*, 461 U.S. at 250 n.12, begs the question of what "more" is required to create a property interest. Petitioners, relying on *Roth*, 408 U.S. at 577, argue that it is a legitimate claim of entitlement to a denial of any application filed by Hillside arising from substantive criteria which limit the planning commission's discretion. In this case, their argument fails for two reasons. First, Petitioners have no legitimate claim of entitlement to a denial. Second, even if they did, the

Roth test, properly understood, should not apply to one opposing the grant of a government permit to another.

Petitioners claim to be entitled to a denial of any special use application based upon a section of the GMC which states that a special use permit shall be granted "only if the usage will not authorize or require any construction or alteration in violation of any ordinances of the city including the planning and zoning ordinance and the city building code." Pet. App. 61, GMC § 18.30.020(5). In construing the ordinance, however, the Colorado Supreme Court held that two other provisions, GMC § 18.30.020(7) and GMC § 18.30.040, controlled over GMC § 18.30.020(5), and provided both the Golden Planning Commission and Golden City Council "significant – if not unlimited – discretion" to approve or deny an application as each deemed appropriate even if the application did not satisfy the requirement of GMC § 18.30.020(5). Pet. App. 16-18. Therefore, the court held that Petitioners had no entitlement to a denial. *Id.*

In order to pursue their claim, Petitioners ask this Court to ignore the Colorado Supreme Court's construction of the ordinance. Pet. 20-21. This Court cannot do so. *R.A.V.*, 505 U.S. at 381 (state supreme court's construction of an ordinance is binding). This is true even if this Court would have construed the ordinance differently. *Id.* at 412 (White, J., concurring); *see also City of Chicago v. Morales*, 527 U.S. 41, 61 (1999) (no authority to construe statute more narrowly than state supreme court); *Johnson v. Fankell*, 520 U.S. 911, 916 (1997) (no authority to place a construction on state statute different from that rendered by state supreme court). Because a special use permit can be approved or denied at the discretion of the planning commission, Petitioners have no legitimate claim of

entitlement under the *Roth* standard. *Roth*, 408 U.S. at 577.

Even if Petitioners could establish a mandatory duty on the part of the planning commission to deny a special use application, the *Roth* test should have no application to them. In a series of cases in the early 1970s, this Court determined that, under certain circumstances governmental benefits such as welfare benefits and government employment are property interests subject to the protection of the Due Process Clause of the Fourteenth Amendment. *See Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare benefits); *Perry v. Sindermann*, 408 U.S. 593 (1972) (government employment); *Roth*, 408 U.S. 564 (government employment). Prior to those cases, government jobs and statutorily created benefits had been considered privileges, not property interests protected by the Due Process Clause. Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 Colum. L. Rev. 1973, 1974 (1996). Following those cases, such rights and benefits sometimes have been referred to as "new property." *See George Washington Univ. v. Dist. of Columbia*, 318 F.3d 203, 207 (D.C. Cir. 2003). In *Roth*, this Court limited the scope of "new property" and held that a government employee had no property interest in continued employment as long as there was no "legitimate claim of entitlement." *Roth*, 408 U.S. at 577.

In applying the *Roth* test in other areas, this Court has limited it to interests having an ascertainable monetary value. Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 964 (2000) ("The various interests recognized as property for procedural due process purposes nearly all have a monetary value."). Neither this Court nor any other has extended the *Roth*

test to find an interest in having another person's request for a governmental benefit denied. *See id.*

In the land use arena, federal circuits have frequently relied upon an absence of a "legitimate claim of entitlement" to dismiss procedural and substantive due process claims filed by unsuccessful applicants for a development permit. *See, e.g., Gardner v. City of Baltimore*, 969 F.2d 63, 71 (4th Cir. 1992); *Silver v. Franklin Township Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992); *RRI Realty Corp. v. Inc. Village of Southhampton*, 870 F.2d 911, 918 (2d Cir. 1989), *cert. denied*, 493 U.S. 893 (1989). As long as the regulatory scheme confers any discretion on the local government as to whether to grant or deny a permit, an applicant has no legitimate claim of entitlement to the permit and, therefore, no property interest for due process purposes. *RRI Realty Corp.*, 870 F.2d at 918.

The clear entitlement test of *Roth* does not make sense when applied to someone opposing another person's application for a governmental benefit. If an application is granted, the applicant receives something from the government, namely a permit. If an application is denied, the opponent receives nothing. The Connecticut Supreme Court adopted this reasoning in *Double I Ltd.*, 588 A.2d 624, when it rejected a neighboring owner's due process challenge to the statutory framework governing the processing of special use applications because it required only notice by publication and not actual notice to adjacent landowners.

> In essence, the plaintiffs are claiming that they have a property interest in the procedures set forth in [the Connecticut statute] and that they were denied the right to avail themselves of these procedures because the statute did not

> require that they receive actual notice of the hearing.

Id. at 631. After first stating that mere procedural rights do not create a property right, the court then refused to apply the *Roth* test to adjacent landowners opposing issuance of a permit. *Id.* at 630-31. The court noted that even if the statute includes substantive criteria that limit the discretion of the decision-making body, "a party whose asserted property interest is not related to the substantive criteria but rather is grounded solely in the procedures set forth in the statute does not have a constitutionally cognizable property interest." *Id.* at 631. It reiterated this holding in *Grimes v. Conservation Comm'n of the Town of Litchfield*, 703 A.2d 101, 104-105 (Conn. 1997), once again emphasizing that substantive criteria mandating a denial of an application do not create a property interest in such denial for adjacent landowners.

The Second Circuit, in *Gagliardi v. Village of Pawling*, 18 F.3d 188, 192 (2d Cir. 1994), also expressed doubt that a property owner "ever could have a protected interest in the enforcement of the zoning laws against an adjoining property" because generalized benefits conferred by statute are not a property interest protected by the Due Process Clause. *Id.* It did not need to rule on the issue because it found that, even if *Roth* applied, the adjoining landowners had not established a clear entitlement to the desired enforcement action. *Id.*

In *Woodward & Lothrop, Inc. v. Neall*, 813 F. Supp. 1158, 1160 (D. Md. 1993), the court stated that the law was well settled that one does not have a property interest in another owner's land use even if that use may adversely affect the market value of one's property. Therefore, the

court held that the *Roth* test had no relevance to one claiming a protected interest in enforcement of regulations against another landowner. *Id.*

No court has actually applied the *Roth* test and found that a party had a property interest in denial of an abutting landowner's development application, although both the Colorado Supreme Court and the Tenth Circuit in footnotes have suggested that such a property interest could arise if the decision-making body's discretion was sufficiently restricted. *See* Pet. App. 15 n.6; *Crown Point I, LLC v. Intermountain Rural Elec. Ass'n*, 319 F.3d 1211, 1217 n.4 (10th Cir. 2003).

The other cases cited by Petitioners in support of their argument do not involve the *Roth* test. In *Brody v. City of Mason*, 250 F.3d 432 (6th Cir. 2001), the Sixth Circuit affirmed the dismissal of the adjacent landowners' procedural and substantive due process claims on various grounds without discussion of whether plaintiffs had a property interest. In *DuLaney v. Okla. State Dep't of Health*, 868 P.2d 676 (Okla. 1994), the court held that adjacent landowners were entitled to notice and an opportunity to be heard before a state agency issued a permit to operate a solid waste disposal site. Once again, there is no discussion of the *Roth* test or whether the plaintiffs would be entitled to a denial of any permit. *Id.* In distinguishing the decision from those of other courts which have held there is no property interest in another owner's land use, the Oklahoma Supreme Court based its decision upon the unique threats posed to adjacent landowners by a landfill. *Id.* at 682 (qualitative difference between homeless shelter and landfill because contaminants from landfill could permanently damage adjacent properties).

In the context in which it arose, the *Roth* test necessarily only applied to an applicant for, or recipient of, a governmental benefit. *Roth*, 408 U.S. 564. No one would seriously suggest that another applicant for Roth's job might have had a property interest in the termination of Roth's employment. Similarly, in *Goldberg*, 397 U.S. 254, a taxpayer would have no property right in the denial of welfare benefits to a non-qualifying recipient. No good reason exists to extend the *Roth* test to non-applicants in the land use context.

The reasoning of the Second Circuit and the Connecticut Supreme Court is more sound than the footnoted dicta of the Tenth Circuit and the Colorado Supreme Court. A denial of someone else's application for a special use permit has none of the features of a property right. It depends for its very existence upon another party filing an application which fails to comply with the applicable criteria. It ceases to exist if the application is amended to comply, if the criteria are amended, or even if the application is withdrawn. If the government denies the application, the opponent receives nothing. If the application is granted, the opponent's use of her property is unaffected, and no property is taken from the opponent. In some instances, the opponent arguably suffers some diminution in property value. As discussed in the next section, however, the Due Process Clause has never been held to protect a property owner from government action which might cause a diminution in property value.

C. Use and Enjoyment of Property

The Petition states that Hillside's expansion caused Olson to suffer a deprivation "related to her use and

enjoyment of her property."[1] Pet. 21. It is undoubtedly true that Olson's ownership interest in her residence is a property interest protected by the Due Process Clause. It is also true, however, that her property interest does not include the right to restrict Hillside's use of its property except to the extent the use constitutes a nuisance or is prohibited by a restrictive covenant. *See* 1 Kenneth H. Young, *Anderson's American Law of Zoning* §§ 3.03, 3.04 (4th Ed. 1995). Petitioners did not claim the existence of any restrictive covenant or nuisance. *See* Pet. App. 34-59. In effect, then, Petitioners are claiming that the zoning regulations grant them a property interest in restricting Hillside's uses similar in nature to a restrictive covenant, and any failure by the government to enforce or correctly administer such regulations deprives them of their property interest.

This Court previously rejected a similar contention while discussing a hypothetical situation. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 674 (1999).

> [N]ot everything which *protects* property interests is designed to remedy or prevent *deprivations* of those property interests. A municipal ordinance prohibiting billboards in residential areas protects the property interests of homeowners, although erecting billboards would ordinarily not deprive them of property. To sweep within the Fourteenth Amendment the elusive property interests that are "by definition"

[1] The Petition is not clear as to whether this particular assertion applies to both Petitioners.

> protected by . . . law would violate our frequent admonition that the Due Process Clause is not merely a "font of tort law."

Id. (emphasis in original). As this Court's billboard hypothetical makes clear, just because a law is designed to protect property values, property owners do not have a property interest in the law itself or its enforcement against other property owners.

Since its earliest cases considering zoning matters, this Court has held that a zoning regulation that causes a substantial diminution in property value does not implicate the Due Process Clause. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). If that is true with respect to a zoning regulation as applied to the plaintiff's own property, it also must be true with respect to zoning regulations as applied to another's property. *See, e.g., Fusco*, 815 F.2d at 206 (decline in property value as result of land use decision with respect to adjacent land not cognizable under Fourteenth Amendment); *Dale v. Town of Elsmore*, 702 A.2d 1219, 1224-25 (Del. 1997) (Due Process Clause does not protect against arbitrary and irrational decision to approve loading zone for adjacent commercial property). In this case, state law provided protection to Petitioners, but that state law did not rise to the level of a property interest. *See, e.g., River Park, Inc.*, 23 F.3d at 166-67 ("Failure to implement state law violates that state law, not the Constitution." (citations omitted)).

The fact that the illegal structure in this case is one that could have been allowed upon approval of a special use application following a public hearing in which Petitioners would have been entitled to participate does not put the Petitioners in a better position than the adjacent landowners complaining of the hypothetical billboard in

College Sav. Bank, 527 U.S. at 674. Whether a use is always prohibited in a zone district or only prohibited if no special use permit has been granted following a hearing, adjacent landowners have only the remedies granted by state law, not a constitutionally protected property interest in enforcement of the prohibition. *See id.*

II. THE OTHER ELEMENTS OF A DUE PROCESS CLAIM ARE MISSING

Even if Petitioners had a property interest in the special use procedures or an entitlement to a denial, the Colorado Supreme Court's decision is correct because the other elements necessary to establish a procedural due process claim are absent.

A. No Deprivation

Petitioners were not deprived of any rights related to a special use permit because Hillside never applied for a special use permit and Golden never issued one. The original judgment in favor of Petitioners was based upon the unstated premise that issuing the building permits was the equivalent of issuing a special use permit.

The unstated premise is wrong. Because Hillside had more than one option available to it under the GMC to obtain approval of the proposed addition, a special use permit was not a necessary prerequisite to obtaining a validly issued building permit for the addition. If the official had not made a mistake when Hillside applied for the building permits, the proper course of action would have been to simply deny the requested building permit. Pet. App. 60, GMC § 18.08.030. As the post-trial history of this case demonstrates, Hillside could then have met the

requirements for obtaining a building permit for the proposed addition either by requesting a special use permit or requesting a rezoning of its property. *See* App. 1-5.

Issuing the building permits for a nonconforming structure violated GMC § 18.08.030. It did not violate the provisions governing special use permits or rezonings. The violation of GMC § 18.08.030 did not implicate any procedural rights of the Petitioners, other than their right to sue for mandamus to correct the mistake under GMC § 18.08.050. They were not deprived of that right. The Due Process Clause does not guarantee a landowner that a building permit will not be issued by mistake to an adjoining landowner. *See College Sav. Bank*, 527 U.S. at 674 (violation of regulation designed to protect property values does not deprive a landowner of property interest); *Gagliardi*, 18 F.3d at 192 (no protected interest in enforcement of zoning regulations against another property owner).

B. No Absence of Due Process

The Fourteenth Amendment does not protect against all deprivations of life, liberty or property, but only those which occur without due process of law. *Parratt*, 451 U.S. at 537. In most cases, due process requires a hearing prior to the time a state interferes with a property interest. *Id.* When, however, the deprivation is caused not as a result of the established state procedure, but by an unauthorized failure of officials to follow the procedure, then due process is satisfied if the state provides an adequate post-deprivation remedy. *Id.* at 542. In *Parratt*, a prisoner lost a mail-ordered hobby kit when officials failed to follow

established state procedures. Because the State of Nebraska provided a remedy for persons who had suffered loss or damage to property as a result of state action, there was no violation of the prisoner's right to due process. *Id.* at 543-544. This was true even though the state procedure did not provide for all of the remedies that would have been available under 42 U.S.C. § 1983. *Id.* at 544.

In this case, the lower courts ruled that Petitioners suffered a deprivation of the right granted to them to participate in a public hearing on the special use application. That deprivation was the result not of Golden's policy, which, in fact, required a hearing before a special use permit was granted and prohibited officials from issuing a building permit for a structure which did not comply with zoning regulations, but rather of an unanticipated failure of the planning official to follow the policy. GMC § 18.08.050 provided, and Petitioners successfully utilized, a remedy to correct this error. Because the deprivation resulted from a random and unauthorized act and the Petitioners had an adequate post-deprivation remedy, they were not deprived of their due process rights. *See Parratt*, 451 U.S. at 542. The same result obtains whether the violation of GMC § 18.30.030 was negligent or deliberate. *Hudson v. Palmer*, 468 U.S. 517, 533 (1984).

> *Parratt* and *Hudson* represent a special case of the general *Mathews v. Eldridge* analysis, in which post-deprivation tort remedies are all the process that is due, simply because they are the only remedies the State could be expected to provide.

Zinernon v. Burch, 494 U.S. 113, 128 (1990). Due process requires only a post-deprivation remedy because it is impossible for the state to anticipate when an official will

negligently or intentionally deprive someone of property. *Id.* at 129-30. Similarly, it is impossible to predict when an official will issue a building permit based upon a mistaken interpretation of the applicable ordinances and, by so doing, deprive someone of the right to a public hearing.

A number of courts have applied the *Parratt* rule in the land use context. *Herwins v. City of Revere*, 163 F.3d 15, 19 (1st Cir. 1998) (wrongful closure of building without prior hearing by health inspector); *Brady v. Town of Colchester*, 863 F.2d 205, 211 (2d Cir. 1988) (availability of state court review of zoning commission precluded procedural due process claim); *New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474, 1479-81 (7th Cir. 1990) (unauthorized denial of building permit did not violate the applicant's due process rights as long as the remedy of mandamus is available); *Rivkin v. Dover Township Rent Leveling Bd.*, 671 A.2d 567, 577-81 (N.J. 1996) ("flawed hearing" as result of biased member of rent leveling board not a violation of due process where state policy mandated recusal and post-deprivation remedy of judicial review existed).

Petitioners argue that the deprivation in this case resulted from official policy, not a violation of such policy, and, therefore, only a pre-deprivation hearing could satisfy due process. *See Logan v. Zimmerman Brush Co.*, 455 U.S. at 435-36. The Colorado Supreme Court found no support for this argument in the record. Pet. App. 20-21. In response to the court's statement, Petitioners suggest, that because the court found no deprivation of due process, it had no basis for determining the adequacy of the remedy for any such deprivation. Pet. 21. In an eight-day trial, Petitioners had ample opportunity to present evidence as to the precise deprivation they allegedly suffered. The

Colorado Supreme Court reviewed that evidence and determined the deprivations were not the result of official policy. Just because the court also concluded that the interests in question were not property does not mean that it cannot determine whether the deprivation of those interests resulted from error or official policy. Petitioners' argument that the court cannot rule on alternative grounds does not merit serious attention.

The Petitioners had an adequate post-deprivation remedy which they successfully utilized. Even if their right to participate in the public hearing is a constitutionally protected right, the post-deprivation remedy satisfied the requirement of due process. *See Parratt*, 451 U.S. at 543-544.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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COLORADO COURT OF APPEALS

Court of Appeals No. 01CA0068
Jefferson County District Court No. 98CV1842
Honorable Kenneth E. Barnhill, Jr., Judge

Marian L. Olson and Ida Mae Brueske,

Plaintiffs-Appellees,

v.

Hillside Community Church, S.B.C.; the City of Golden; and the City Council of the City of Golden,

Defendants-Appellants.

ORDER REVERSED

Division V
Opinion by JUDGE VOGT
Kapelke and Casebolt, JJ., concur

NOT SELECTED FOR PUBLICATION
October 18, 2001

Victor F. Boog & Associates, P.C., Victor F. Boog, Linda A. Battalora, Lakewood, Colorado, for Plaintiffs-Appellees

Holley, Albertson & Polk, P.C., Dennis B. Polk, Golden, Colorado, for Defendant-Appellant Hillside Community Church, S.B.C.

Griffiths, Tanoue, Light, Harrington & Dawes, P.C., Steven J. Dawes, Denver, Colorado, for the City of Golden and the City Council of the City of Golden

Defendants, Hillside Community Church, S.B.C., the City Of Golden, and its City Council, appeal a trial court order holding them in contempt and enjoining further proceedings on Hillside's rezoning application. We reverse.

The order at issue here was entered based on the trial court's determination that defendants had failed to do what the court had previously ordered as part of the final judgment in an action brought against them by plaintiffs, Marian L. Olson and Ida Mae Brueske. As relevant here, that judgment ordered the City to vacate the certificate of occupancy it had issued for Hillside's newly-constructed addition and directed that no new certificate of occupancy be granted absent approval of a special use permit issued in compliance with the City's municipal and building codes. The judgment further required that Hillside apply for a special use permit and request a hearing on its application, and that the City conduct such a hearing.

On appeal, a division of this court affirmed the portions of the judgment at issue here, agreeing with the trial court that the City's failure to require Hillside to obtain a special use permit violated plaintiffs' due process rights to testify at a special use permit hearing. *See Olson v. Hillside Community Church*, ___ P.3d ___ (Colo. App. No. 99CA2070, Sept. 13, 2001).

After entry of the judgment, Hillside did not apply for a special use permit but, instead, filed an application seeking rezoning as a planned unit development. Plaintiffs then sought and obtained an order directing defendants to show cause why they should not be held in contempt for disobeying the trial court's orders in its prior judgment.

Before the show cause hearing was held, the City's planning commission held hearings on Hillside's rezoning

application and recommended that the City Council approve it.

At the conclusion of the show cause hearing, the trial court found that defendants had intentionally failed to comply with its prior judgment. Granting the remedy sought by plaintiffs for defendants' contempt, the court enjoined defendants from proceeding with Hillside's rezoning application.

On appeal, defendants contend that the trial court erred in finding them in contempt and enjoining further proceedings on the rezoning application. We agree.

A trial court has the power and the duty to enforce its own orders. *See In re Estate of Elliott*, 993 P.2d 474 (Colo. 2000). A court may enter a finding of civil contempt for refusal to obey a court order if it finds that a party who has a duty to obey the order and a present ability to obey it has refused to perform the act required. *People v. Lockhart*, 699 P.2d 1332 (Colo. 1985).

However, a party may be held in contempt only for refusal to do what the court order specifically requires. A party may not be held in contempt for refusal to do that which the court has not ordered it to do. *People v. Lockhart, supra*; *see also Eatchel v. Lanphere*, 170 Colo. 545, 463 P.2d 457 (1970) (reversing contempt judgment where there was insufficient evidence that respondents were under an obligation to proceed as trial court directed); *McMullin v. City & County of Denver*, 125 Colo. 231, 242 P.2d 240 (1952) (city could not be held in contempt where decree of court did not require it to do or refrain from doing anything); *In re Marriage of Zebedee*, 778 P.2d 694 (Colo. App. 1988) (reversing finding of contempt where husband's actions did not violate any court order).

Here, the judgment that defendants were found to have violated did not preclude Hillside from filing, or the City from processing, an application for rezoning as a planned unit development. Although the judgment ordered Hillside to apply for a special use permit and the City to conduct a hearing on such application, it did not specify a time frame for the accomplishment of these objectives. Thus, while the trial court understandably could have perceived defendants' actions as intended to circumvent the previous judgment, those actions did not amount to a violation of any specific prohibitory or mandatory provisions of that judgment.

We also note that, as recognized by the division in the first appeal, a primary purpose of the previous judgment was to give plaintiffs the opportunity to be heard. The record indicates that plaintiffs were afforded such opportunity in hearings on Hillside's rezoning application.

Finally, if the rezoning application were to be granted, plaintiffs would not be left without a remedy, but would be able to challenge that determination in a proceeding under C.R.C.P. 106(a)(4). *See Snyder v. City of Lakewood*, 189 Colo. 421, 542 P.2d 371 (1975), *overruled in part by Margolis v. District Court*, 638 P.2d 297 (Colo. 1981).

Because the evidence did not establish that defendants violated the trial court's prior judgment, the finding of contempt based on such asserted violation is not sustainable. See *In re Marriage of Zebedee*, *supra*. It follows that the injunction entered as a remedy for the contempt must likewise be set aside.

In light of our resolution of this issue, we need not address defendants' additional contentions on appeal.

The order is reversed.

JUDGE KAPELKE and JUDGE CASEBOLT concur.

DISTRICT COURT, JEFFERSON COUNTY, COLORADO 100 Jefferson County Parkway Golden, Colorado 80401	COURT USE ONLY
Plaintiffs: MARIAN L. OLSON and IDA MAE BRUESKE Defendants: HILLSIDE COMMUNITY CHURCH, S.B.C., a Colorado non-profit corporation; COLORADO BAPTIST GENERAL CONVENTION, a Colorado non-profit corporation; THOMAS K. MURPHY, DOUGLAS KINNER; FIRST BANK OF ARVADA, N.A.; THE PUBLIC TRUSTEE OF JEFFERSON COUNTY, COLORADO; and THE CITY OF GOLDEN, Colorado municipal corporation; and THE CITY COUNCIL OF THE CITY OF GOLDEN	Case Number 98-CV-1842 Division 2
ORDER	

THIS MATTER having come before the Court for hearing on the Order to Show Cause issued December 27, 2001, and

THE COURT having heard testimony and the arguments of counsel on March 4th and 14th, 2002 and the Court otherwise being fully advised in the premises, it is

HEREBY ORDERED, ADJUDGED AND DECREED that the Defendants The City of Golden and The Council of The City of Golden have shown cause why they should not be held in contempt for disobeying the Order of Senior District Judge Kenneth E. Barnhill dated October 6, 1999, and, therefore, the Order to Show Cause dated December 27, 2001 is discharged.

BY THE COURT:

_____

District Court Judge
March 26, 2002
Stephen M. Munsinger

DISTRICT COURT, JEFFERSON COUNTY, COLORADO 100 Jefferson County Parkway Golden, Colorado 80401	
Plaintiffs: MARIAN L. OLSON and IDA MAE BRUESKE Defendants: HILLSIDE COMMUNITY CHURCH, S.B.C., et al.	COURT USE ONLY
THE OVERTON LAW FIRM Thomas J. Overton, 12459 1080 Kalamath Denver, CO 80204 Telephone: (303) 832-1120 Attorneys for Hillside Community Church, S.B.C.	Case Number 98-CV-1842 Division 2
CERTIFICATE OF MAILING RE:	

ORDER DATED MARCH 26, 2002

I hereby certify that on the 26th day of March, 2002, I sent a true and correct copy of the foregoing Order to:

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Linda A. Battalora, Esq.
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Respectfully submitted this 26th day of March, 2002.

THE OVERTON LAW FIRM
By: Thomas J. Overton